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the Bushmen, where indeed, save among the Namib groups, it cannot be said to exist at all. 626 [171]

Personal disputes or grievances of a minor character were settled among the Cape Hottentots[1] by the two parties themselves, either in verbal argument or more often by means of a hand-to-hand fight. No one took any heed of such quarrels except the women, who, in order to prevent their resulting in serious hurt or manslaughter, would intervene between the two men and ask them to stop. It was regarded as a serious disgrace if the men ignored this request and still continued to fight.[2] In more serious cases the matter was referred to a court consisting of the "captain" and all the adult men of the kraal, with the exception of those directly affected by the dispute. As soon as any complaint was made to the "captain", say about the disputed possession of cattle, he summoned all the men to a convenient open space outside the kraal, where they all sat round in a circle. The plaintiff and the defendant, together with their witnesses, were then given full hearing, each party conducting his own case. The councillors thoroughly examined the statements on both sides, and after discussion the decision was reached by the vote of the majority. The verdict was pronounced by the headman, and the party in whose favour it went obtained full possession of the disputed property. In cases of wounds and bodily hurt the same procedure was followed, and damages awarded in cattle in proportion to the injury received. Offences such as murder, manslaughter, treason, theft, incest, adultery, and sodomy, regarded as crimes punishable by death, were also tried before this council. As soon as a man was known or suspected of having committed such an offence, every member of the kraal considered it a duty to arrest him at the first opportunity, unless he succeeded in making his escape. Once captured he was safely held until the council assembled, which was always as soon as possible. The councillors sat in a circle, and the accused was placed in the centre, where he could hear all that was said and himself be heard by everybody around. The accuser then stated his case, and produced all his proofs, supported by witnesses. The prisoner, in return, offered all means of defence the case would suggest, advancing any contradictory evidence at his command, and his answer 627 [562] [576] 695 [674] [694]

[1] Kolb, op. cit., 138-9; cf. Peinaar, op. cit., 310.

[2] Some light perhaps is thrown upon this punishment by the fact that among the Herero, as we have noted, a woman can generally be relied upon to stop any fight in which her husband, either actual or classificatory, is taking part. The sacrilege here is the assault done to a woman by her husband.

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was listened to with undivided attention. The matter was then thoroughly discussed by the councillors, the verdict being arrived at by the decision of the majority. If the accused was acquitted, a few head of cattle from the herds of his accusers were adjudged to him as compensation. But if he was found guilty, and the headman, in whose hands the final sentence lay, pronounced in favour of death, the sentence was immediately executed. The headman, as chief executioner, rushed towards the criminal and felled him to the ground with a heavy blow of the kirri; all the other men then violently attacked him until he was beaten to death.[1]

No distinction was made in the execution of this sentence according to the status, wealth, age, or sex of the criminal; the headman himself, if found guilty of such a crime, would be dealt with in the same way. The body of the criminal, however, was buried with all the customary formalities observed in normal cases of death; his property was inherited as usual by his heirs, and no stigma attached to them as a result of his crime and his fate. There is good reason for supposing that this corporal punishment was not necessarily carried to extremes, but could be made more or less severe, according to the nature of the case and the decision of the council.

There was no appeal from the verdict of the kraal council, either in civil disputes or in crimes. The main tribal council, consisting of the chief and the kraal headmen, dealt only with disputes between different kraals. It was summoned by the chief on receipt of any complaint, and its proceedings were conducted along the same lines as those of the kraal councils.

The description given above can hardly be regarded as exhaustive or even as entirely trustworthy. Its interest lies mainly in the comparison it affords with the conduct of trials among the Naman, about whose legal usages we have more adequate information.[2] The local kraal councils can deal with civil disputes and minor offences, and impose corporal punishments or fines; but there is always an appeal from their judgments to the main tribal council, to which all cases of importance are also referred as a court of first instance. No special distinction is made in procedure between civil and criminal cases. The judges in all important trials are the elected councillors

[1] An eye-witness account of such an execution, in which four men were beaten to death, is given by Cordes-Melchiorgen, op. cit., I, 172–3.

[2] The fullest accounts are given by Wandres, "Ueber Rechtsbrauchtümer und Rechte der Hottentotten," 270–6; Vedder, "The Nama," 140–41; Kohler, "Das Recht der Hottentotten," 350–7; cf. also Hahn, "Die Nama-Hottentotten," 306; von François, *Nama und Damara*, 201; Wandres, "Die Khoi-Khoin," 304–5; *Report on the Natives of S.W.A.*, 73–6 *passim*.

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of the tribe. The eldest of them presides over the proceedings; 693
the others are his assessors, *na-aigu*, and can take part freely in the examination of the litigants or accused and of the witnesses. One of them also acts as public prosecutor, another as advocate for the defence (*gewalo-aob*, intercessor). The post of councillor, as we have seen, is honorary and carries no salary, but certain court fees are levied in trials. The complainant must deliver a couple of fat goats in advance in order to have his case heard, and these provide food for the judges as long as the court sits. The defendant also may be required to contribute a similar fee, even before the verdict is arrived at.

The initiative in any legal proceedings lies in the hands of the 694
complainant. Self-help is not permitted. He must lodge his grievance with the official known as the magistrate. The latter then summons the councillors, who assemble together on the day fixed for the hearing. The court meets as a rule out in the open, under the shade of some tree, where all squat in a circle. The litigants or accused and the witnesses are then summoned by the public messenger, who as sign of his function carries with him a long stick. With this, on entering the hut of the defendant, he knocks three times on the ground, without speaking a word. Then he goes away as silently as he came. The defendant now knows that his presence is required. If he refuses to appear, which in fact seldom happens, or fails to send an acceptable excuse in time, several strong men are sent to take and bring him by force. For defying the summons he then receives a special flogging. [681]
If he is accused of some crime, and is suspected of meditating flight, he is brought before the court with a riem[1] round his neck and his hands tied behind his back. Witnesses summoned are obliged to appear, and if they do not are fetched and punished in the same way as the defendant. The latter must stand or kneel in the centre of the court 695
circle, but if a woman is permitted to sit. The complainant stands or squats nearby till he is called upon to speak, and the summoned witnesses must also remain within a reasonable distance.

The magistrate now states the case to the council. The chairman then calls on the complainant to speak, next on the defendant and on all the witnesses one after the other. One witness as a rule is sufficient, but more are desirable. No hearsay evidence is allowed; only what the witness has himself seen and heard is admitted as valid. False testimony is severely condemned, the perjurer being punished [687]
according to the mischief he causes. Examination and cross-examination are conducted by the councillors. They rarely employ direct 695 195

[1] [i.e., a single strip of cowhide. – Analyst]

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695 [195] questions, but prefer to arrive at their point by circumlocutions. When they have probed the matter to their satisfaction, or when the accused has either confessed or been reduced to helpless silence by all the cross-questioning, both parties, together with the witnesses, have to withdraw to a distance. The case is then discussed among themselves by the councillors, and judgment is arrived at unanimously, if possible. Only in cases where there is no consensus of opinion is the matter referred to the chief, whose casting vote settles the question finally.

The verdict, opening with the words: "In the name of the chief's law," is pronounced by the chairman, and is forthwith executed. 696 Sentences of death are carried out by the official executioner, who is 698 appointed from time to time by the council, and by his assistant; if corporal punishment has been decided upon, the *saw-ood*, "thrashing-man," gets into action; while any fines levied are collected by the magistrate. The costs of the action, in the form of goats paid as court fees, always fall upon the losing party. If this is the defendant, he must also replace the goats delivered at the beginning of the case by the complainant.

695 No torture is employed in legal trials, nor are there any special oaths or ordeals. Wandres describes, however, what he terms a sort of duel by warrant, which was sometimes resorted to in the past. This duel, *ikiga*, could take place with or without weapons. When the councillors were unable to secure harmony between the litigants, the oldest of them took some sand in the palm of each hand, which he held out before the two men, or else he poured a little sand on to their shoulders. If the challenge was accepted, the sand was brushed away; but if one of the men refused it, he was branded as a coward and held to be in the wrong. Where both accepted the challenge, the councillors formed a ring around them. They then attacked each other with their fists, kicked, wrestled, and hit, until one of them [574] was overpowered. Reconciliation followed. The victor slaughtered a fat sheep, which was eaten by him and his opponent, with the councillors as guests. Before the feast the two men shook hands in a friendly manner, and as sign of their reconciliation they ate together out of one dish. Finally there followed a general shaking of hands. The duel with weapons was of a more serious nature, and might even result in death. If reconciliation could not be brought about by the councillors, the two men left the court in a rage, and fought with their kirris or spears until one of them was stretched senseless, perhaps

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even dead, on the ground. The victor was not punished, and in some cases he also inherited the property of his unfortunate opponent.[1] 695

Another resort sometimes employed was divination. If the council was unable to decide the guilt of a person, the diviner, *ǃa aoti*, was called in for assistance. He had with him two small strips of leather, *ǃaxa*, one with a copper head, the other with an iron head attached to the end. The former was regarded as male, the latter as female. These leather strips the diviner beat on the fist of his hand or on the ground, at the same time invoking the oracle with the words: *ai, ai, amaa ai, ǃaonis gan, ona ai ais /ua ǃkau tai!* "Tell, speak, tell the truth, if you lie, then I will burn you in the fire!" Then he jerked the strips from his hand into the circle formed about him by the council with the litigants or the accused. The ends to which the heads were attached had to point towards the culprit. Wandres explains the working of this method by the firm belief which the Namas even at the present time have in this oracle. The diviner, a skilled reader of men, carefully observes the litigants or the accused while busy with his strips. The real culprit, like all the others, believes in the efficacy of the oracle, and therefore cannot hide his apprehensions, with the result that the diviner can readily recognize his man, and with a twist of his hand divert the strips towards him.[2] 695 787

The main penal sanctions among the Namas are flogging, fines, and death. A sentence of death can nowadays only be passed by the European administration and its duly-constituted law courts, to which all cases involving it must be referred. Punishment in the native courts is therefore confined to flogging and to fines payable as a rule in goats. There are no fixed rules for the degree of punishment, but certain pragmatic principles are observed. Offences against the community are more severely punished than those against individuals. Accidental misdeeds are not regarded as crimes; but unsuccessful attempts meet with punishment, while self-defence, although not sufficient ground for acquittal, produces amelioration of the sentence. Incorrigible offenders are expelled and their property confiscated; in the old days they might even be killed. The confirmed cattle thief has to expect harder punishment at every conviction, until ultimately the death sentence would formerly have been decided upon; nowadays the matter is then referred to the law courts of the Europeans. 681 [673]

[1] Op. cit., 172-3; cf. Hahn, *Tsuni-ǁGoam*, 103-4.
[2] Op. cit., 173.

South West has become a colony and a mandated territory. 692
confidence in their own jurisdiction has decreased even where it has been left in their hands. They do not regard their own judges as impartial enough to administer justice to the complainant or accused. This is no wonder! As a result of their close cohabitation it is very difficult for a judge to administer justice quite regardless of the person and his property.

3. In earlier days and in some tribal unions still to-day 695
the procedure in a law-suit is as follows: The complainant lodges his complaint with the magistrate who at the same time exercises the powers of a policeman. The magistrate then summons the judges; and the complainant and accused are summoned by messengers. The sitting takes place in the open as a rule. The complainant has to provide sufficient food for the judges as long as they sit. Generally he delivers some goats in advance in payment of the legal expenses. If the accused is unwilling to appear he is brought by force by strong men duly authorized in such circumstances. The complainant as well as the accused stand at a distance from the place where the court is held or squat down on the ground till they are called. The summoned witnesses also remain within a reasonable distance. The magistrate then lays the case before them. The oldest person amongst the judges, who is chairman, then gives the complainant the word. Thereupon the accused is heard. Care is taken that only one person speaks at a time; for the rest absolute freedom prevails. If the case has been sufficiently investigated the complainant and the accused together with the witnesses have to withdraw. The judgment is passed unanimously when possible and pronounced by the chairman. If punishment is to be inflicted it is executed at once and the accused has to replace the goats paid for expenses by the complainant.

4. The methods of punishment in olden days were: Death 681
executed in many ways according to the nature of crime. He, who had slain someone, was beaten to death with clubs and sticks. When one had shot another, he also was shot. Other sentences were: Fines, payable in goats; corporal punishment in the form of flogging or branding and, lastly, confiscation of property or the declaration of such people, who have been found to be a danger to the public, as of unsound mind. These were then outlawed and could be done away with, without being punished. To-day a sentence of death can only be passed by the Government and duly constituted law-courts. Punishment among the Nama to-day is confined to flogging, fines and fees payable in goats.

5. Rules for the degrees of punishment were never, and 681
have not yet been, definitely fixed. Nevertheless no rule was 685
allowed to be broken within certain boundaries. The confirmed cattle-thief had to expect harder punishment at each conviction and these were usually meted out in the form of

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Ontrent over vijf jaren is 't gebeurt, dat zeker persoon, een groote vriendt en na-maagschap van den Koningen of Koning van de Saldanhars, in kinderlandt was verrezen, doch dood overwon, zonder aenzien op zijnen persoon, recht over den zelven, maer rechte toegiaen door groote voorspraek met een roode gewelling, en uitvinnen van al zijne beesten, en huisgesteltenis vry, en begaf zich by de Gerechtsdienaers, by het Vier van gemelder hoge, verlaten van al zijne vrienden, met beloofte achter, dan een by zich als te weere weder wilde dragen, al dan weder in genade souden aengenomen worden. Een teken van zoch eenige hadt onder deze wilden.

STRAFFE EN DOODSLAGEN DER GEVANGEN.

Wanneer iemand den eenen of den anderen, door grootmoedigheid of heerschzucht, kunst dood te slaen of te stelen, zulx wort by hen zoude voor een gewichtige zake opgenomen, inzonderheit indien een persoon van aenzien, redelijk van wijsheit, staet en rijkdom, zulx gepleeght heeft; overmits zy meggen, zulk een persoon, met meer verstant als een ander, beter behoorde te weten, en eenen anderen met goede exempelen, (zeggenden by zoda een voorde-wijser is wijselijk voor te gaen. Wanneer wort zulk eenen de hals om eenen boom toegevoeght, en dood in het zelfde graf by den dooden gelegt; daer in tegendeel andere eenemale tyranniare luiden 't selven door vee, en geringer straffe beter kunnen afmaken, dan een groote wijze (of, hoe genoemt wort) raetgever. Eenmalgen misdadigers, die de dood verdient hebben, worden de kinen doorsnaght en met een zwaer penne aen de schouderen vast gebonden, en dus met een langzame dood gestraft.

HUWEN.

Wat trouwe huisdingen belangt, zy leven als d'Arabiers op 't veld, in hutten, gemaekt van enkele kruin gevogten stokken, in 't zomt gezet, en met bies-matten, die zy zelfs maer met een aerdigh weten te vlechten, overdekt; de sommigen zijn wel een groot, dat bequamelijk tien of twintigh man, met vrou en kinderen, daer in hun verblijf kunnen houden;

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[*] Dapper's account of Hottentot legal procedure and method of punishment is much fuller than that of most other observers, so that its accuracy cannot be easily estimated. From such other information as is available, however, it seems that offences such as murder, manslaughter, treason, theft, incest, adultery and sodomy were all regarded as crimes punishable by death, and were tried by the chief and his council. The court sat in a circle, with the accused in the centre, where he could hear all that

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It happened about five years ago that a certain man, a great friend and kinsman of the Koshqua or King of the Saldanhars, sank so low as to commit incest. But justice was done upon him as well, without regard for his person. He managed nevertheless by pleading hard to get off with a whipping, the confiscation of all his cattle, and exile; and betook himself to the Goringhaikonas at the Fort, deserted by all his friends, but with the promise that if he should conduct himself as before then he would again be taken into favour. This shows again that even to these savages discipline is not unknown. 684

PUNISHMENT OF HOMICIDE AND ASSAULT.

They also regard it as a serious offence when anybody, through anger or passion, beats or stabs someone else to death, especially when it has been done by a man of reputed wisdom and important status and wealth. They say that such a man, gifted with more understanding than others, ought to know better, and should set them a good example, considering that he is also a judge. He is in consequence strangled on a tree, and then laid dead in the grave. The less sophisticated common people, on the other hand, can get off more lightly for the same offence by paying cattle, and so have a lighter punishment than important and reputedly wise councillors. Some filchers who have merited death have their knees pierced through and attached by an iron peg to the shoulders, and thus are punished by a lingering end.[1] 682

DWELLINGS.

As regards their dwellings, they live, like the Arabs of the desert, in huts, made of some sticks bent over crooked and ranged in a circle, and covered over with reed mats, which they can weave very nicely. Some of these huts 342

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was said and himself be heard by everybody around. The accuser stated his case, producing all his proofs and witnesses. The accused in return put forward whatever defence he could, and the matter was then thoroughly discussed by the councillors, the verdict being arrived at by the decision of the majority. If the accused was acquitted, a few head of cattle from the herds of his accusers were adjudged to him as compensation. But if he was found guilty, and the chief, in whose hands the final sentence lay, pronounced in favour of death, the sentence was immediately executed. The chief, as principal executioner, rushed upon the criminal and felled him to the ground with a heavy blow of the kirri; all the other men present then followed up the attack, until the man was beaten to death. There is no mention of the more elaborate methods of killing referred to by Dapper. (Schapera, op cit., 390 ff.) 695 696